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CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA
JACKIE SMITH, CLERK

IN THE CIRCUIT COURT OF JEFFERSON COUNTY
CIVIL DIVISION / BIRMINGHAM

STATE OF ALABAMA,	)	
Ex rel, ATTORNEY GENERAL STEVE MARSHALL	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	**CV 17-903426-MGG**
	)	
	)	
CITY OF BIRMINGHAM; and,	)	
RANDALL L. WOODFIN, in his OFFICIAL CAPACITY	)	
As MAYOR OF THE CITY OF BIRMINGHAM,	)	
	)	
Defendants,	)	

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

On May 1, 2018, the Court issued an ORDER [Doc. 68] in which it requested post-hearing briefing on the interpretation of several portions of the Alabama Memorial Preservation ACT of 2017 (***"the ACT"***) and Defendants CITY OF BIRMINGHAM and MAYOR RANDALL WOODFIN's (collectively, ***"the CITY"***) affirmative defenses to enforcement of the ACT on the grounds that it violated their federal free speech and equal protection rights. In response, the CITY filed its POST-HEARING BRIEF [Doc. 70].

Shortly thereafter, the SOUTHERN POVERTY LAW CENTER (***"SPLC"***) filed its MOTION FOR LEAVE TO FILE BRIEF OF AMICUS [Doc. 74] urging this Court to grant the CITY's CROSS-MOTION FOR SUMMARY JUDGMENT [Doc. 51] and deny the MOTION FOR SUMMARY JUDGMENT [Doc. 43] filed by the STATE OF ALABAMA (***"the STATE"***). As no opposition was filed to SPLC's MOTION FOR LEAVE, it is due to be **GRANTED**. The Court has **CONSIDERED** its BRIEF OF AMICUS CURIAE SOUTHERN POVERTY LAW CENTER IN SUPPORT OF DEFENDANTS.

Finally, the STATE then filed its CONSOLIDATED RESPONSE TO THE DEFENDANTS' POST-HEARING BRIEF AND BRIEF OF AMICUS CURIAE SOUTHERN POVERTY LAW CENTER [Doc. 84]. Each of the foregoing have Exhibits that are set out in the official record of this ACTion.

DISCUSSION

The STATE contends this Court need not reach the issues of statutory interpretation the Court posed in its ORDER [Doc. 68] as to the cited provisions of the ACT because the only

portions of the ACT at issue in this suit—and the only portions the Court accordingly has jurisdiction to apply—are whether the CITY violated ALA CODE § 41-9-232(a) (1975)[1] "altered" or "otherwise disturbed" the Confederate Soldiers and Sailors Monument in Linn Park (***"the Monument"***) (stipulated to have been situated in Linn Park for more than forty years) by placing a plywood screen around it; and, whether the STATE may enforce the penalty provision against the CITY on a $25,000.00 per-day basis.

Generally, the STATE contends that because an Alabama municipality is a mere instrumentality of the STATE, the STATE can restrict the CITY's power to express its disagreement with the ACT. Likewise, the STATE further contends, this Court need not reach the issues raised with respect to the CITY's federal constitutional defenses "… because a well-established line of federal cases holds that municipalities lack standing to assert state statutes violate their rights under the United States Constitution because they are creatures or instrumentalities of their states of origin" [Doc. 84, p. 2], and not private citizens.

The STATE contends that it brought suit under specific provisions of the ACT, and the CITY lacks standing to assert it is injured by the potential application of other portions of the ACT not at issue in this case. The STATE emphasizes "Standing . . . turns on whether the party has been injured in fact and whether the injury is to a legally protected right." *State v. Property at 2018 Rainbow Drive known as Oasis*, 740 So. 2d 1025, 1028 (Ala. 1999) (internal quotation and citation omitted). [Emphasis added] To suggest this lawsuit is simply whether the CITY's placing a twelve-foot high wooden screen around the Monument "altered" or "otherwise disturbed" the monument in violation of the ACT, presumes simply that the ACT cannot be challenged, period. To so argue makes the STATE's power unassailable, period.

However, there is a well-established line of cases establishing that a state's power over its municipalities—like any state power—is subject to constraints. Although a state's legislative control over municipalities is extensive, the U.S. Supreme Court has never acknowledged the states' "plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations." *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979)[2]. Rather, municipalities, including those in Alabama, have rights not conferred by state legislative

[1] The ACT is codified at ALA. CODE §§ 41-9-231, *et. seq*. (1975).
[2] Unless later superseded by Eleventh Circuit precedent, a Fifth Circuit decision issued before October 1, 1981, binds this court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*); *Muhammad v. Muhammad*, 2016 WL 3509529 (11th Cir.)

grace, which include: (1) a "legally protected right" to free speech, and, (2) a "legally protected right" not to be deprived of its property without due process of law.

LEGALLY PROTECTED RIGHT TO FREE SPEECH

Although the U. S. Supreme Court has not articulated a precise test for distinguishing government speech from private speech, the Courts have identified three relevant factors from *Walker v. Texas Div., Sons of Confederate Veterans, Inc*., 135 S.Ct. 2239 (2015), and *Pleasant Grove City*[3] *v. Summum*, 555 U.S. 460, 467-68 (2009) (citing *Bd. of Regents v. Southworth*, 529 U.S. 217, 229 (2000), to-wit: (1) the history of the speech at issue; (2) a reasonable observer's perception of the speaker; and (3) control and final authority over the content of the message. The result reached in *Summum* was the conclusion, "[p]ermanent monuments displayed on public property typically represent government speech." *Id.* at 470. Therefore Pleasant Grove City's speech (action regarding the display) is protected, and citizens cannot force the city to propound speech or ideas with which it does not agree. Importantly, the Court also found that a monument's message "may change over time," noting that "[a] study of war memorials found that people reinterpret the meaning of these memorials as historical interpretations and the society around them changes." *Id.* at 477 (internal quotations omitted).

As to the whether the CITY enjoys protected speech, the Court examines the three relevant factors from *Walker* and *Summum*. First, the history of the Monument need not be set out here, as it is extensively set out in the SPLC's BRIEF. Briefly, as stipulated [Doc. 38]:

- in 1905, the Pelham Chapter of the United Daughters of the Confederacy dedicated the Monument to Confederate soldiers who fought in the Civil War in Capitol Park, since renamed Linn Park;
- the Monument contains the phrases "In Honor of the Confederate Soldiers and Sailors" … "The manner of their death was the crowning glory of their lives" … "To the memory of the Confederate soldiers and sailors. Erected by the Pelham Chapter, United Daughters of the Confederacy. Birmingham, Ala. April 26, 1905."; and,
- The Monument contains inscriptions of crossed sabers, muskets, and an anchor, with four stone artillery balls lying at its base

The fact that the CITY has had for many years an overwhelmingly African-American population and a majority African-American elected Mayor and City Councilors also need not be set out, again, because it is set out in the BRIEFS. It is undisputed that an overwhelming majority of the body politic of the CITY is repulsed by the Monument.

[3] This is not "Pleasant Grove, Alabama"; rather a city in the State of Utah.

As to a reasonable observer's perception of the Monument, in *Summum*, the Court held that Pleasant Grove City was exercising its right to government speech in rejecting a privately-donated monument for permanent display in the city's Pioneer Park. *Id*. at 472. Despite being donated by a private organization, the Court determined that the display of the monument at issue would be government, as opposed to private, speech because persons observing the monument on city property would reasonably interpret the monument as conveying a message on the city's behalf. *Id*. at 470-471 ("Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land."). The Court found that "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land. City parks . . . commonly play an important role in defining the identity that a city projects to its own residents and to the outside world." *Id.* at 472.

As to control and final authority over the content of the message of the Monument, per § 41-9-232(a), since it has sat in Linn Park for more than forty years, it cannot be "… relocated, removed, altered, renamed, or otherwise disturbed." § (b) addresses whether a defined structure has been situated or otherwise for twenty years but less than forty years; and, §(c) addresses schools which fall under the pertinent definitions. § 41-9-235(a) establishes a waiver process to avoid the ACT's restrictions for those things described under § 41-9-232(b) and (c), but not as described under § (a), which, of course, the subject Monument falls. In short, under any reading of the ACT, there is simply no way, no process, no procedure available for the CITY to petition for relief to do anything to the Monument despite how much it does not want to be perceived as honoring what it honors. Thus, the ACT establishes absolute control and final authority over the content of the message, i.e., homage to the Confederacy.

A city has a right to speak for itself, to say what it wishes, and to select the views that it wants to express. *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819 (1995); *Rust v. Sullivan,* 500 U.S. 173, 194 (1991); *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring)); *see also Creek v. Vill. of Westhaven*, 80 F.3d 186, 192 (7th Cir. 1996) (observing that municipalities ACT as amplified voices for their constituents and that "the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern.") (Posner, J.). Thus, for example, a city may exercise editorial control over privately-donated monuments situated on city land. *Summum*, 555 U.S. at 471-72.

This is not the first time the STATE has "invoke[d] generalities expressing the State's unrestricted power" over municipalities to impose its will. *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960). In *Gomillion*, the STATE OF ALABAMA raised this same unrestricted, unassailable power to contend that African American residents of the City of Tuskegee could not challenge a legislative change to municipal boundaries as discriminatory under the Fourteenth and Fifteenth Amendments. *Id.* at 340. The U. S. Supreme Court rejected the argument "that the States have power to do as they will with municipal corporations regardless of consequences." *Id.* at 344. Rather, the Court reaffirmed that "[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." *Id.* at 344–45

The U. S. Constitution's limitations on speech regulation apply to states, *City of Ladue v. Gilleo*, 512 U.S. 43, 45 n.1 (1994), and the STATE cannot flout those limitations and restrict the CITY's expressive conduct vis-à-vis the Monument. The STATE acknowledges that the CITY is generally free to engage in government speech, (Doc. 62 at 13), but explains that the ACT withdraws from the CITY the right to engage in a particular expressive message, (Doc. 62 at 10-12). This explanation is impermissibly content-based. Just as the STATE cannot manipulate a city's boundaries to pursue the illegitimate purposes of discrimination and disenfranchisement, *Gomillion*, 364 U.S. at 344–45, it also cannot manipulate the CITY's speech for the illegitimate purpose of favoring certain content or viewpoints.

Here, the STATE's interest in preserving the Monument, and its means of doing so, are bound up with the Monument's expressive content. For example, the STATE does not own the property on which the Monument is situated, (Doc. 58 at ¶ 3), and therefore the STATE has no property interest to protect. And, as the leading cases on government speech establish, the CITY's ownership of the park all but determines that the CITY is the speaker. *See, e.g.*, *Summum*, 555 U.S. at 471-72. When "considered [in] the context in which it occurred," *Johnson*, 491 U.S. at 405—the aftermath of racially-motivated violence in other Southern states, (Doc. 54 at 13–14)—the CITY's conduct here is only expressive disassociation from a pro-Confederacy message. The STATE has not articulated an interest in penalizing this conduct other than disagreement with the message.

Despite the CITY's desire to reject a pro-Confederacy message, the STATE contends the ACT compels the CITY to do so. This cannot be. *Summum* and its progeny establish that the CITY, as the park's owner, is the entity communicating at the park. Just as the STATE could not force any particular citizen to post a pro-Confederacy sign in his or her front lawn, so too can the STATE

not commandeer the CITY's property for the State's preferred message. That the ACT compels the CITY to express the STATE's preferred message does not transform the message into the STATE's speech. The relevant speaker in Linn Park is, under *Summum*, the CITY. The STATE can substitute its speech for the CITY's only through constitutional means, which necessarily excludes unjustified compelled ideological speech. *Id*. Thus

The practical ramification of the STATE's position is that the ACT renders pro-Confederate speech immune from a local political process that rejects a message of white supremacy. But the Constitution protects "an open marketplace where ideas, most especially political ideas, may compete without government interference," *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 208 (2008), and "it is the democratic electoral process that first and foremost provides a check on government speech," *Walker*, 135 S. Ct. at 2245. The democratic process here flew into motion after the people of Birmingham witnessed race-based violence across the South and decided, through their elected officials, to reject a message of African American inferiority. Under the ACT, however, the people of Birmingham cannot win. No matter how much they lobby CITY officials, the STATE has placed a thumb on the scale for a pro-Confederacy message, and the people, acting through their CITY, will never be able to disassociate themselves from that message entirely. This is so because the ACT makes no provision for removing those monuments most likely to convey a pro-Confederacy message. It is no answer that the CITY could erect *other* monuments or signs criticizing the Confederacy (Doc. 62 at 13-14); the CITY has the right to disassociate from a pro-Confederacy message entirely. By rendering that result impossible no matter how much the people of Birmingham lobby or vote, the ACT risks the further harm that "[m]any persons . . . will choose simply to abstain from protected speech"—advocacy to remove pro-Confederate messages—"harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

The STATE's power over the CITY is no answer where, as here, the basis for the exercise of state power is a distortion of the marketplace of ideas that the Constitution does not allow. *Cf. Gomillion*, 364 U.S. at 344–45 ("Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution."). Just as when the Supreme Court recognized municipal rights as enforceable against the federal government, protecting the CITY's speech here advances the interests not only of "the public entity," but of "the persons served by it." *50 Acres of Land*, 469 U.S. at 31. In short, the STATE

is impermissibly forcing the City to speak in favor of the Confederacy and its values, and as such, is denying the CITY its right to government speech.

LEGALLY PROTECTED RIGHT TO DUE PROCESS

The ACT also violates the Fourteenth Amendment to the U. S. Constitution because it deprives the CITY of property without due process of law. As already discussed, the power of a state over its municipalities, while broad, is not limitless; it is circumscribed by "the relevant limitations imposed by the United States Constitution." *Gomillion,* 364 U.S. at 344-45.

That the CITY is being deprived of property is clear. *First*, the STATE seeks to recover at least $25,000.00 from the CITY. *Second*, the STATE seeks to control what the CITY may or may not build on its own land, thus restricting its exercise of its rights as the owner of Linn Park. The STATE also seeks to control how and even whether the CITY maintains the Monument, thus restricting its exercise of its rights as the owner of the Monument and also forcing it to spend some of its monies on preservation of this Monument. (*See* Doc. 58 at ¶ 8). The Court **RECOGNIZES** the CITY's argument as to violation of Amendment 621 of the Official Recompilation of the Constitution of Alabama of 1901, as amended, and **AGREES** it unconstitutionally imposes an increased expenditure of municipal funds. [Doc. 70, p.16] That the CITY's property interests are affected by this case is not in dispute.

What process is due under the Fourteenth Amendment before deprivation of property is a question for the United States Constitution, not a state statute. *Cleveland Bd. of Ed. v. Loudermill,* 470 U.S. 532, 541 (1985). A state's deprivation of real property can be accomplished only with notice and an adequate hearing. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)).

Under the ACT, there is no process at all – no notice and no hearing. According to the STATE, it may decide what the CITY can and cannot do with its own property, Linn Park and the statuary inside it. There is no provision in the ACT for the CITY or its citizens to be heard concerning the use of Linn Park and the Monument. And while of course the current litigation provides due process before the STATE will take $25,000.00 or more in fines, under the STATE's reading of the law, the Court's role would be merely pro forma, since the CITY has no rights as against the STATE. (Doc. 62 at 11). The absence under the ACT of an opportunity to be heard at all, much less at a meaningful time and in a meaningful manner, violates the Fourteenth Amendment.

THE LACK OF A SEVERABILITY CLAUSE IN THE ACT

The ACT does not contain a repeal clause. A general act may amend or repeal a local act by express words or by necessary implication. *Vaughan v. Moore*, 379 So.2d 1240 (Ala.1980). It is well established that repeal by implication is not favored. *Willis v. Kincaid*, 983 So.2d 1100 (Ala.2007). More specifically, this Court has recognized "[t]he rule that implied repeal is disfavored when the earlier act is specific and the subsequent act is general." *Marks v. Tenbrunsel*, 910 So.2d 1255 (Ala. 2005). A later statute may repeal an earlier statute by implication only under certain circumstances, such as when the two statutes, taken together, are so repugnant to each other that they become irreconcilable. *Hurley v. Marshall County Comm'n*, 614 So.2d 427, 430 (Ala.1993)

By way of example, municipalities in Alabama have authority, but are not required, to repair or demolish unsafe structures, or seek such actions, pursuant to several different provisions of the ALA. CODE (1975) including statutes that provide authority through Class legislation for Class 2, 4, 5, 6, and 8 municipalities. Most of these statutes contain "Cumulative" clauses which state that the provisions "…shall be cumulative in its nature, and in addition to any and all power and authority which any such city may have under any other law." As stated, repeal by implication is not favored. Implied repeal is essentially a question of determining the legislative intent as expressed in the statutes. *Shiv–Ram, Inc. v. McCaleb*, 892 So.2d 299 (Ala.2003) (quoting *Fletcher v. Tuscaloosa Fed. Sav. & Loan Ass'n,* 314 So.2d 51 (1975), quoting in turn *State v. Bay Towing & Dredging Co.*, 90 So.2d 743 (1956)). Statutes should be construed together so as to harmonize provisions as far as practical, and in event of conflict between two statutes, specific statute relating to specific subject is regarded as exception to, and will prevail over, general statute relating to broad subject. *Ex parte Jones Mfg. Co., Inc.* 589 So.2d 208 (1991); *Murphy v. City of Mobile*, 504 So.2d 243 (Ala.1987); *Bouldin v. City of Homewood*, 174 So.2d 306 (1965). Moreover, " 'the last expression of the legislative will is the law, in cases of conflicting provisions in the same statute, or in different statutes, the last enacted in point of time prevails.' " *Williams v. State ex rel. Schwarz,* 197 Ala. 40, 54, 72 So. 330, 336 (1916).

The ACT also does not contain a severability clause. The inclusion of a severability clause is a clear statement of legislative intent to that effect, but the absence of such a clause does not necessarily indicate the lack of such an intent or require a holding of inseverability. The judiciary's severability power extends only to those cases in which the invalid portions of an act are not so intertwined with the remaining portions that such remaining portions are rendered meaningless by

the extirpation. *State ex rel. Pryor ex rel. Jeffers v. Martin*, 735 So.2d 1156 (Ala.1999). The lack of a severability clause does not end the court's inquiry, because "courts will strive to uphold acts of the legislature." *City of Birmingham v. Smith*, 507 So.2d 1312 (Ala.1987).

Where a statute is partly infected with invalidity, a severable or saving clause is persuasive that the legislature intended that should an invalid portion be stricken, the valid part should survive. *Hamilton v. Autauga County*, 268 So.2d 30 (Ala.1972). If after the deletion of the invalid part, the remaining portions of an Act are complete within themselves, sensible, and capable of execution, the Act will stand notwithstanding its partial invalidity. *Springer v. State ex rel. Williams*, 157 So. 219 (Ala.1934).

If any part of an Act is declared invalid or unconstitutional, that declaration shall not affect the part which remains unless an unconstitutional provision in the Act is overbroad and unreasonable and is "so intertwined with the remaining portions" of the Act that the Act would be meaningless without it. *State ex rel. Jeffers v. Martin*, 735 So.2d 1156 (Ala.1999) ("Under these well-established principles, the judiciary's severability power extends only to those cases in which the invalid portions are ' "not so intertwined with the remaining portions that such remaining portions are rendered meaningless by the extirpation." ' *Hamilton v. Autauga County*, 268 So.2d 30 (1972) (quoting *Allen v. Walker County*, 199 So.2d 854 (1967)). If they are so intertwined, it must be assumed that the legislature would not have passed the enactment thus rendered meaningless. In such a case, the entire act must fall as the objectionable portion cannot be severed, and the Act in its entirety is unconstitutional. *State v. Lupo*, 984 So.2d 395 (Ala. 2007).

The subject part of the ACT that combines to deprive the CITY of its Constitutionally protected speech, as well as to deny its Constitutional right to due process is § 41-9-235(a). This section permits a waiver process for protected things at least twenty years old, but less that forty years old, and, schools. The Court cannot rewrite § 41-9-235(a) by inserting language to allow structures sitting on public property for more than forty years to apply for a waiver, or otherwise modify § (a). § (a) is clearly intertwined in the entire ACT because it is the "gatekeeper" of who can apply for a waiver. As such, it is also overbroad and unreasonable.

Under these principles of statutory interpretation, having already DETERMINED those parts and aspects of the ACT that deprive the CITY of its Constitutionally protected rights, this Court has no choice but to, reluctantly, **DECLARE** that ACT 217 of the 2017 Regular Session of the Legislature of the State of Alabama, popularly known as the Alabama Memorial Preservation Act, is **VOID** and of **NO** legal effect or authority.

Accordingly, it is hereby **ADJUDGED, ORDERED** and **DIRECTED** as follows:

1. ACT 217 of the 2017 Regular Session of the Legislature of the State of Alabama, popularly known as the Alabama Memorial Preservation Act, is **VOID** and of **NO** legal effect or authority;
2. The MOTION FOR LEAVE TO FILE BRIEF OF AMICUS [Doc. 74] SOUTHERN POVERTY LAW CENTER [Doc. 74] is **GRANTED**;
3. The MOTION FOR SUMMARY JUDGMENT [Doc. 43] filed by the STATE OF ALABAMA is **DENIED**;
4. The CROSS-MOTION FOR SUMMARY JUDGMENT [Doc. 51] filed by the CITY OF BIRMINGHAM and MAYOR RANDALL WOODFIN, is **GRANTED**; and,
5. Costs are **TAXED** as paid.

DONE and **ORDERED** this date, *January 14, 2019.*

S/Michael G. Graffeo
MICHAEL G. GRAFFEO
Circuit Judge